IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 734

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KRAUSS BROS. LUMBER COMPANY, a corporation,

*Petitioner,*

vs.

DIMON STEAMSHIP CORPORATION, a corporation, Claimant of the Steamship PACIFIC CEDAR, her engines, tackle, apparel, etc.,

*Respondent.*

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# BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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## DECREE BELOW

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In the lower court, respondent filed exceptions to petitioner's libel (R. 25, 26). These exceptions were sustained (R. 39) and a decree entered dismissing the libel on two grounds, to-wit: (1), that Admiralty has no jurisdiction and, (2), that no maritime lien exists (R. 41). The Circuit Court of Appeals for the Ninth Circuit affirmed the District Court in dismissing the libel in rem (R. 72, 73, 74), and reversed the District Court as to the libel in personam, holding that the action while not the basis of a maritime lien was cognizable in Admiralty in personam (R. 64-72). The Circuit Court

remanded the cause in personam to the District Court with directions to try the issues of fact on the answer filed by the ancillary receivers for respondent, Dimon Steamship Corporation (R. 85, 86). Petitioner now seeks to review the ruling entered on the in rem action before presenting the cause on its merits in the District Court on the libel in personam.

## STATEMENT

Petitioner's statement of the "Question Presented" and "Summary of Facts," while substantially correct, includes conclusions of the petitioner as to the interpretation of the contract in question. There are also some deficiencies in emphasis of material facts.

The affreightment contract entered into between petitioner as shipper and respondent as carrier (R. 9) is one for the carriage of lumber at stipulated rate of $10.00 per M feet net measurement. Under the heading of "Remarks" in a separate part of the same contract the clause concerning a lower rate (commonly known as a "fall clause") is stated as follows:

> "In the event regular intercoastal carrier moves similar cargo at lower rate, such lower rate is to be applied."

The cargo was carried as agreed and discharged "between the 1st and 20th days of March, 1930, and that between the 1st and 20th days of March, 1930, at New York City, New York, the respondent, Dimon Steamship Corporation and respondent, Steamship PACIFIC CEDAR demanded, received and collected from libelant (petitioner) the sum of $14,657.30, the freight

on the aforementioned shipment at the rate of $10.00 per M feet" (R. 5, 6). It is alleged that during January, 1930, a regular intercoastal carrier moved similar cargo at a lower rate of $8.50 per M feet net measurement (R. 6). Petitioner then alleges that "later" it demanded payment to it by respondent of the difference between $10.00 per M feet and $8.50 per M feet, which demand was refused (R. 6). Libel in rem against the respondent Steamship PACIFIC CEDAR and in personam against Dimon Steamship Corporation, owner thereof, was filed May 18, 1931 (R. 2) fourteen months after the cargo was discharged and the freight had been paid.

## QUESTION PRESENTED

Does a maritime lien exist against a vessel in favor of a shipper on the following facts: A cargo of lumber was loaded, carried and delivered at destination and accepted by consignees. Freight at the rate of $10.00 per M feet as provided in the contract was voluntarily paid by the shipper. The contract contained a contingency clause that if a regular intercoastal carrier moved a similar cargo at a lower rate such lower rate would be applied (R. 9). It is alleged that a regular intercoastal carrier did carry at a lower rate (R. 6). This fact was unknown to any of the parties at the time the freight was paid. The freight voluntarily paid by petitioner and received by respondent Dimon Steamship Corporation was more than should have been paid. Some time later, stated in the libel as "before the commencement of this proceeding" (R. 6) petitioner demanded payment of the difference between $10.00 per M feet and $8.50 per M

feet, which respondent refused to pay. Fourteen months after voluntary payment of the freight a libel in rem and in personam was filed (R. 2).

## GROUNDS ASSERTED AS A BASIS FOR GRANTING THE WRIT NOT SUFFICIENT

### I

### There is No Conflict of Decisions Between Circuit Courts of Appeal

Petitioner cites but one case in support of this position, to-wit, *The Oregon, et al v. Pittsburgh & Lake Angeline Iron Company*, 75 Fed. 666, by the Circuit Court of Appeals for the Sixth Circuit. The case of the OREGON, supra is not a case in conflict with the one at bar. The question of Admiralty jurisdiction in rem was not raised by the parties or considered an issue by the court. One of the claims made by charterers was to recover from the owners certain profit wrongfully paid the owners by the Master of the ship. The case also involves other claims against the vessel. "Another averment was that the OREGON without the consent of the libelant took in tow a great many vessels on her trip to and from Marquette, thereby preventing her from making as many trips as possible and resulting in the loss of another trip" (page 668). The nature of the claim involved was different than in the present case. The money collected by the captain and paid by him to the owners rightfully belonged to the charterers (the libelant) and in no sense involved a contingency or voluntary payment on mutual mistake or ignorance of facts, nor does it appear from the reported

decision whether the action was solely in rem or both in rem and in personam. In any event the issue of in rem jurisdiction was not raised and it cannot be said therefore, even assuming the facts to be in point with the case at bar, that there is conflict in the decisions.

## II

## The Question Does Not Justify Settlement by This Court

Respondent does not feel required to answer the purely extra legal and academic statement of petitioner as to inconvenience which might result from the non-existence of a maritime lien on the facts of this case. The rights of shippers of cargo have been defined by numerous decisions of this Court. No uncertainty exists as to the nature, basis or application of the law of maritime liens on vessels. The application of such general principles to particular facts is not the function of this Court unless there is a conflict in existing decisions or ambiguity and confusion in the application of the law as established, to particular facts. It is true that no decision of this Court can be found wherein the well established law of maritime liens has been applied to the exact facts involved in the case at bar. The application made by the Circuit Court of Appeals in its decision is not in conflict with decisions of this Court but is based upon and follows the decisions of this Court.

Petitioner on page 9 of its Brief cites three cases as being applicable to the question presented here and contrary to the holding of the Circuit Court of Appeals in the case at bar.

*B. L. Harriman v. Emerick*, 76 U. S. (9 Wall.) 161, 19 L. Ed. 629 (1870);

*Allanwilde Transportation Corporation v. Vacuum Oil Company*, 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312 (1919);

*International Paper Company v. Gracie D. Chambers*, 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318 (1919).

These cases are not based upon the same or similar facts as those in the case at bar but do announce the same rules of law which the Circuit Court of Appeals has applied to the particular facts in the present case. The question of the existence or non-existence of a maritime lien was not an issue before the court in those cases. Each case was decided upon its merits. No question of jurisdiction in rem could have been raised therein as each case involved an issue of an alleged unfulfilled obligation of the vessel itself.

In the Harriman case, supra, there was involved a charter of the vessel to deliver coal to the Spanish Navy at an unknown destination, one-half of the freight money to be paid upon loading and the balance to be paid on return of cancelled bills of lading showing delivery. The consignee could not be found and the vessel returned without delivery of the coal. Upon return, the vessel offered to deliver the coal to the shipper upon payment of the balance of the freight due, which was refused. The owner of the vessel sold the cargo under a claim of lien for freight and the shipper libeled for the return of the prepaid freight and value of the cargo sold. Recovery of freight paid and proceeds from the sale of the cargo was affirmed by this Court.

Concerning the issues presented, this Court said, at page 170:

> "In settling the rights of the parties the inquiries which demand our attention are: What was the contract between them? *Was it fulfilled by the ship;* and if not, was the non-fulfillment excused, by phone or waiver, on the part of the charterer or by other facts disclosed in the proofs so as to entitle the owner to all or any part of the freight money stipulated for in the charter party." (Italics ours).

The Court held that the ship had not fulfilled its contract. No question was raised as to jurisdiction in rem and the case cannot be cited as authority on this point. Also there was involved a failure of performance by the vessel itself in that it had not carried and delivered the cargo as agreed.

> "The existence of war was known to both parties when the contract was entered into. The owner made no provision against any contingency. His engagement was simple, direct and unconditional, that the vessel should proceed to Valpariso. The presence or absence of the consignee was immaterial. If absent, it was the right and duty of the Master to place the cargo in store. The contract was not fulfilled; for this the shipper is in no wise responsible. Such are the relations of the parties."

In the Allanwilde and the International Paper Company cases supra, the situations were the same. Both actions were to recover prepaid freight by reason of the failure of the vessel to carry and deliver the cargo as agreed. The cargo had been loaded on board and the freight prepaid but clearance was refused by the government on all

vessels bound for the War Zone. This Court in both cases held for the respondent on construction of the bills of lading involved. *The basis of the claim was a failure of the vessel to perform its undertaking. No question of in rem jurisdiction was mentioned in either case.*

This Court had frequently held and it is elemental that a decision is not an authority upon a question not considered by the Court even though involved in a case decided.

*Durousseau v. United States*, 6 Cranch, 307;
*United States v. More*, 3 Cranch, 159;
*United States v. Mitchell*, 271 U. S. 9; 46 Sup. Ct. Rep. 418.

## III

### This Case Follows Applicable Decisions of This Court

What has already been said in Section 2 of this brief concerning the cases of *B. L. Harriman v. Emerick*, 76 U. S. (9 Wall.) 161, 19 L. Ed. 629 (1870); *Allanwilde Transportation Corporation v. Vacuum Oil Company*, 248 U. S. 377, 39 S. Ct. 147, 63 L. Ed. 312 (1919); *International Paper Company v. Gracie D. Chambers*, 248 U. S. 387, 39 S. Ct. 149, 63 L. Ed. 318 (1919), applies here. These decisions are not in conflict with the case at bar but follow the same general rules applied to different facts.

Petitioner attacks the Circuit Court of Appeals' decision for misapplication of the two cases of *Vandewater v. Mills*, 60 U. S. (19 How.) 82, 92, 15 L. Ed. 554, 557 and *Osaka Shosen Kaisha v. Pacific Export Lumber Company*, 260 U. S. 490, 499, 67 L. Ed. 364, 367.

The decision of the Circuit Court of Appeals does not attempt in any manner to apply the particular facts of either case cited above to those of the present case. These cases are cited and followed as the general rule of this Court for establishing "the basis for a maritime lien upon a ship in cases involving a contract for affreightment" (R. 72). These cases, having established general rules of maritime law are authority for any case involving a maritime lien when used as a test and determination of the existence of a lien on any given set of facts.

To the general rules of law expressed by this Court the Circuit Court of Appeals applied the facts of the present case and concluded (R. 74):

> "To enforce a lien against a ship where neither the owner or master of the ship on the one hand or the owner of the cargo on the other, knew of the facts upon which the lien is predicated, until after the right delivery of the cargo and where no visible acts or occurrence would give notice of the lien to the public would press the doctrine of a maritime lien beyond reason and beyond authoritative decisions. We concur in the conclusion of the trial judge that under the circumstances of this case no maritime lien exists on the ship."

This conclusion is sound. On the authority of *Vandewater v. Mills*, 60 U. S. (19 How.) 82, 92, the obligation between ship and cargo is "mutual and reciprocal."

> "But this duty of the vessel to the performance of which the law binds her by hypothecation is to deliver the cargo at the time and place stipulated in

the bill of lading or charter parties without injury or deterioration."

By analogy to the case of *Osaka Shosen Kaisha v. Pacific Export Lumber Company* supra, where it is held:

"The contract of affreightment itself creates no lien and this court has consistently declared that the obligation between ship and cargo is mutual and reciprocal and does not attach until the cargo is on board or in the Master's custody." * * *

there can be no lien created for matters beyond a right delivery of cargo, at which time the vessel has performed its duty and mutual and reciprocal obligations have been terminated.

We are impressed by the result of reversing the facts and assuming that the clause contained in the contract provided for a higher rate on contingency. If the stated rate in the contract had been paid by the shipper on delivery under mutual mistake or ignorance of facts entitling the carrier to a higher rate, could the carrier impress a lien on the cargo for additional freight in the hands of consignees or the shipper after a right delivery. We think not.

The decisions of this Court are thoroughly in accord with the rule followed by the Circuit Court of Appeals on the in rem feature of this case to the effect that maritime liens being secret liens which may operate to the prejudice of general creditors and purchasers without notice are therefore *stricti juris* and cannot be extended by construction, analogy or inference. They are mutual and reciprocal.

## IV

### This Case Follows the Weight of Authority

In the case now before this Court, the libel does not allege that payment of freight was demanded and paid as a condition precedent to discharge and delivery of the cargo. It is not alleged that the happening of the contingency expressed in the contract was known to any of the parties at the time the stipulated freight of $10.00 per M feet was paid by petitioner. There are no allegations of any act or omission on the part of the vessel or that the vessel did not fully perform its obligations of safe carriage and proper delivery of cargo as agreed. The most that can be said from the allegations of the libel (R. 3, 4, 5, 6, 7, 8) which are taken as admitted for the purpose of considering exceptions to the libel is that there was a mutual mistake of fact at the time the freight was paid.

In addition to the general principles discussed in Section 3 of this brief supra, there is a further rule of law applicable to maritime liens which when applied to the facts in the case at bar distinguishes this case from those cited by petitioner as constituting the weight of authority. The rule is thus stated:

> *A maritime lien can be effected only by some visible contact with or occurrence relating to the service of the ship and must arise from an open, manifest, physical act or omission of maritime service.*
>
> *Osaka Shosen Kaisha v. Pacific Export Lumber Company*, 260 U. S. 490, 67 L. Ed. 364, 367;
>
> *The* S. L. WATSON, 118 Fed. 945 (C. C. A. 1st);

*The* KEOKUK, 9 Wall. 517; 519, L. Ed. 474, 475; *Israel v. Moore & MacCormack Company* (D. C.), 295, Fed. 919.

The inquiry here is as to what occurrences give rise to a maritime lien on a vessel. It has been frequently stated that it is not the policy of the maritime law to extend the doctrine of maritime liens to every matter relating to a vessel and its operation. These liens only arise when the vessel itself as distinguished from its owners commits some act or omission of duty imposed upon it. No lien exists before cargo is loaded or upon that which is loaded in respect to that which is not, as in the case of "dead freight." If, then, the vessel has made a proper and safe delivery of the cargo it has undertaken to carry, the imposition of a lien beyond the obligation of safe delivery when reciprocal rights have terminated would seem to violate the established rules of this Court as expressed in the case of *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490. In that case this Court adopted the authority expressed in The S. L. WATSON, 118 Fed. 945, 952, as follows:

> "The rule of admiralty, as always stated, is that the cargo is bound to the ship and the ship to the cargo. Whatever cases may have been decided otherwise disregarded the universal fact that no lien arises in admiralty except in connection with some visible occurrence relating to the vessel or cargo or to a person injured. This is necessary in order that innocent parties dealing with vessels may not be the losers by secret liens, the existence of which they have no possibility of detecting by

any relation to any visible fact. It is in harmony with this rule that no lien lies in behalf of a vessel against her cargo for dead freight, or against a vessel for supplies contracted for, but not actually put aboard. *The Kiersage*, 2 Curt. C. C. 421, Fed. Cas. No. 7,762; Parsons, Shipping & Admiralty, 1869, 142, 143. It follows out the same principle that Mr. Justice Curtis states in *The Kiersage*, 2 Curt. C. C. 424, Fed. Cas. No. 7,762, that admiralty liens are stricti juris, and that they cannot be extended argumentatively, or by analogy or inference. He says: 'They must be given by the law itself, and the case must be found described in the law.' "

A further distinction exists in these cases which was not mentioned by the Circuit Court of Appeals in the present case. This distinction is the separable nature of the contract involved as expressed by the District Court in its opinion (R. 35):

" * * * every act having relation to maritime services was fully performed. The fact that the contract contained a stipulation that upon contingency another rate should apply is not decisive but rests upon the inquiry: May the claim for rebate on the alternate rate be separably enforced. *Compagnie Francaise v. Bonasse*, 19 Fed. 2nd, 777."

*Keyser v. Blue Star Steamship Co.*, 91 Fed 267;

*United Fruit Co. v. U. S. Shipping Board Merchant Fleet Corp.*, 42 Fed. 2nd, 222;

*Pillsbury Flour Mills Co. v. Interlake Steamship Co.*, 40 Fed. 2nd, 439 (C. C. A. 2);

*Taylor v. Weir*, 110 Fed. 1005;

*Brown v. West Hartlepool Steam Navigation Co.*, 112 Fed. 1018;

The claim for rebate, even though arising out of a contract of affreightment is separable and can be separably enforced. It (the claim) has no relation to any physical occurrence connected with the vessel or its undertaking to safely carry the cargo at a stipulated rate. It has no relation to any breach of duty by the vessel to deliver the cargo at the time and place stipulated for delivery. The claim is an independent and separable right, if any, arising on contingency created by a third party, to-wit, "other intercoastal carrier."

*Israel v. Moore & MacCormack Co.*, 295 Fed. 919;

*The Oceana*, 148 Fed. 131.

In the Israel case supra, Judge Learned Hand had before him a claim for the recovery of freight voluntarily paid by the shipper by mistake. Part of the cargo, concerning which the freight sought to be recovered was paid, had been jettisoned unknown to the shipper. In holding that Admiralty had no jurisdiction and that the action was one in assumpsit, and in distinguishing that case from the Oceana supra, the Court said:

"* * * the right of recovery rested (in The OCEANA), rested upon the ship's unfilled promise."

Such was the understanding of the District Court in the present case (R. 38, 39): "In the case at bar, no action of the Master gave rise to the claim nor did the agreement between the owners of the ship and the owners of the cargo but the act of another."

The maritime lien has been extended in the relation between ship and cargo after loading as expressed in

*Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, to the performance of "right delivery" as expressed in the *Poznan* (D. C.) 276 Fed. 418:

> "In the *Poznan* (D. C.) 276 Fed. 418, decided by Judge Learned Hand who sat in *The Saturnus* case, the libels against the charterer and owner were in personam and in rem against the ship for pilferage and damage to cargo. He said that an action in rem could only be maintained for damage to the cargo resulting from the transportation such as improper stowage, breakage, pilfering or something of that nature but the decision was not limited to such damage, for in another part of the opinion it is stated that *there was a lien or privilege against the ship for 'right delivery,'* a term that in my opinion is not simply limited to safe and sound delivery but one that impliedly includes right delivery at a place designated by the shipper." (Italics ours).
>
> *The* G. A. TOMLINSON, 279 Fed. 786.

No case exists as authority for a lien for performance beyond right delivery, at which time reciprocal rights terminate. Petitioner has cited none.

In establishing the "weight of authority" petitioner has cited many cases involving liens for the recovery of freight. It is too clear for argument that a lien may exist for recovery of prepaid freight when the ship has committed a breach of its undertaking having to do with the loading, carriage and delivery of the cargo and this applies to breaches by the Master as well. The facts of those cases are widely different from the present case.

Those cases involve some "fault of the vessel or Master" (The *Keokuk*, 9 Wall. 517).

In *The Panama*, Fed. Cas. 10,703, the vessel failed to sail.

In *Church v. Shelton*, Fed. Cas. 2714, the Master made fraudulent representations.

In *The St. Joseph*, Fed. Cas. 3908, part of the cargo had been jettisoned.

In *The Hardy*, Fed. Cas. 6056, the Master failed to account for the purchase price of cargo and freight collected from consignees.

In *The A. M. Bliss*, Fed. Cas. 274, freight advanced to the vessel was not earned because the voyage contemplated by the charter was not prosecuted.

In *The Emma*, Fed. Cas. 18218, the Master collected money and failed to account for it. The Court in that case said:

> "The duties assumed are entirely those of a common carrier and a common carrier is as much liable for a failure to transport and deliver what is received by him for transportation as he is for failure to deliver any other character of freight."

In *The Henry W. Breyer*, 17 Fed. (2d) 423, the vessel failed to sail after the cargo was loaded.

The issue here is not whether the lien having once been created can be enforced or exist after the vessel and cargo are separated but is whether the matters alleged in the libel are of such a nature as to give rise to a lien in the first instance. The use of the words "right delivery" do not refer to a point of time but to a performance of undertaking, to the completion of which the vessel is hypothecated.

## CONCLUSION

This case involves well established rules of maritime law concerning the existence of maritime liens. The Circuit Court of Appeals has applied these rules as established by this Court to the particular facts of this case and held that no maritime lien was created under those facts. There is no conflict in the law between different Circuit Courts of Appeal. The case cited by petitioner is clearly distinguishable on the facts involved and no question of in rem jurisdiction was raised or discussed by the Court.

There is no conflict between this case and any decision of this Court. The law as established by this Court in *Vandewater v. Mills*, 60 U. S. (19 How.) 82, 90, 15 L. Ed. 554, 556, and *Osaka Shosen Kaisha v. Pacific Export Lumber Company*, 260 U. S. 490, 499, 67 L. Ed. 364, 367, is followed and applied to particular facts. The Circuit Court of Appeals does not attempt to apply the facts of those cases to the case at bar, but follows them on the law announced as determining the basis and character of a maritime lien.

The fact that this Court has never applied the established rules of law as announced by this Court to the particular facts involved in the case at bar is not sufficient ground for granting writ of certiorari.

The application of the law to the particular facts in the case at bar is not contrary to the weight of authority as contended by petitioner. Each case cited by petitioner wherein a maritime lien was allowed for the recovery of freight paid can be clearly distinguished from the case at bar on the particular facts involved. Each case involved

some failure in performance of the obligations on the part of the Master or vessel "to deliver the cargo at the time and place stipulated in the bill of lading or charter party without injury or deterioration." (*Vandewater v. Mills*, 60 U. S. 82, 90). No such failure of performance exists in the case at bar. The action is one to recover money from the respondent in the nature of excess freight paid by reason of a contingency for a lower rate unknown to the parties at the time payment at the stipulated rate was voluntarily made and received. The action has no reference to the performance of carriage and delivery of the cargo. There is alleged an independent claim made enforceable by the action of a third party, to-wit; another intercoastal carrier and has no relation to the vessel or the mutual and reciprocal obligations between ship and cargo. These had terminated by right delivery.

The only reported case involving similar facts which can be considered in point is the case of *Israel v. Moore & MacCormack* (D. C.), 295 Fed. 919, 920, where it was held that there was no jurisdiction in admiralty at all but only an action in assumpsit.

The law is well settled by this Court and not undetermined as claimed by petitioner. No reason has been cited why this Court should grant a writ of certiorari unless it be to make an application of established law to particular facts.

Respondent respectfully submits that the petition for writ of certiorari be denied.

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